

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN REALBERTO J. LARRIEU,	:	
DIANE E. LARRIEU,	:	
Debtors.	:	
	:	CIVIL ACTION
BANK PHILADELPHIA,	:	
Appellant,	:	
v.	:	
	:	
HAMBURG, RUBIN, MULLIN,	:	NO. 99-3875
MAXWELL & LUPIN,	:	
Appellee.	:	

MEMORANDUM AND ORDER

JOHN, J. January , 2000

Alberto J. Larrieu and Diane E. Larrieu (collectively the “debtors”), retained the law firm of Hamburg, Rubin, Mullin, Maxwell & Lupin, P.C. (“Hamburg”), to represent them in connection with the filing of a voluntary Chapter 7 bankruptcy petition, which was filed on December 24, 1996 (the “filing date”). Before the filing of the petition, the debtors paid Hamburg fees for services performed as bankruptcy counsel (the “pre-petition fees”). At the time of the filing of the bankruptcy petition, Hamburg filed a disclosure statement revealing some but not all of the pre-petition fees paid to it by the debtors.

On March 4, 1999, the appellant in this action, Bank Philadelphia (the “Bank”),¹ filed with the bankruptcy court a Motion to Compel Disclosure and Disgorgement of Unauthorized

¹The Bank was formerly known as People’s Thrift Savings Bank. As of the filing date, the Bank was a secured creditor of the debtors. See Motion to Compel Disclosure and Disgorgement of Unauthorized Payments of Professional Fees and Expenses (“Bank’s Motion”) (Bankr. Doc. No. 101) at ¶ 2. On June 20, 1997, the Bank filed a Proof of Claim against the debtors in the amount of \$466,704.41. See *id.*

Payments of Professional Fees and Expenses (“Bank’s Motion”). In this motion, the Bank sought the disclosure and disgorgement of fees owed or paid to Hamburg. It also sought the disclosure and disgorgement of fees owed or paid to Terry J. Siman, a lawyer who had acted as a financial consultant to the debtors. In response to the Bank’s motion, Hamburg filed a supplemental disclosure statement (the “supplement”), divulging that the debtors owed Hamburg \$67,595 (the “post-petition fees”), of which \$13,121.14 had already been paid by the debtors. ²

Before the bankruptcy court, Hamburg took the position that it had disclosed all of its pre-petition fees and expenses. Hamburg also argued that it did not have to disclose its post-petition fees, which Hamburg asserted would be paid out of non-estate property because the fees would be paid from the post-petition earnings of the Chapter 7 debtors. The bankruptcy court disagreed with Hamburg, concluding that disclosure of the post-petition fees was required. The court then ordered Hamburg to file a fee application. Hamburg complied.

In its June 17, 1999, order, the bankruptcy court concluded that Hamburg failed to make fee disclosures as required by applicable bankruptcy law. In particular, the court found that Hamburg failed to disclose all of its pre-petition and post-petition fees. See Order of Bankr. Ct. June 17, 1999 (Bankr. Doc. No. 126). Consequently, the bankruptcy court ordered Hamburg to disgorge all pre-petition fees and credit them toward the balance owed. The court also ordered that the amount owed to Hamburg be reduced by \$10,000 to account for its failure to disclose the post-petition payments.

²Specifically, before the filing of the petition, the debtors paid Hamburg \$1,675 for professional services as bankruptcy counsel. These pre-petition fees were paid in three separate installments dated June 21, 1996, August 28, 1996, and September 20, 1996. The statement filed by Hamburg pursuant to Rule 2016(b) only disclosed fees of \$1,000 paid by the debtors to Hamburg. Hamburg sought, and received, court approval of this \$1,000 fee.

The Bank now appeals the bankruptcy court's decision. The Bank argues that the bankruptcy court erred by: (1) refusing to order a full accounting for and disgorgement of unauthorized payments of fees and expenses made to and undisclosed by Hamburg; (2) imposing a meaningless sanction on Hamburg by allowing the sanctions against Hamburg to be offset against the fees still owed by the debtors; and (3) treating the Bank's motion against Simanas being "abandoned."

STANDARD OF REVIEW

The district court, sitting as an appellate tribunal, applies a clearly erroneous standard to review the bankruptcy court's factual findings and a *de novo* standard to review its conclusions of law. See In re Siciliano, 13 F.3d 748, 750 (3d Cir. 1994). A district court will not reverse a bankruptcy court's decision to award or disgorge attorneys' fees absent an abuse of discretion. See In re Paster, 119 B.R. 468, 469 (E.D. Pa. 1990); see also In re Lewis, 113 F.3d 1040, 1043 (9th Cir. 1997) (explaining that the district court reviews a bankruptcy court's decision about attorneys' fees for abuse of discretion); In re Downs, 103 F.3d 472, 477 (6th Cir. 1996) (noting that because a bankruptcy court is afforded broad discretion to issue sanctions, the district court will not disturb such sanctions without first concluding that the bankruptcy court abused its discretion).

DISCUSSION

As the appellant in this action, the Bank challenges the bankruptcy court's decision on three main grounds. First, the Bank argues that the bankruptcy court erred in refusing to order a full accounting for and disgorgement of unauthorized payments of professional fees and expenses made to and undisclosed by Hamburg. Second, the Bank challenges the sanction imposed by the

bankruptcy court, describing it as a “meaningless sanction.” Third, the Bank contends that the bankruptcy court erred in treating as “abandoned” the Bank’s motion for a full accounting and disgorgement of fees paid to Siman.

In response, Hamburg argues that the bankruptcy court did not abuse its discretion by ordering a partial disgorgement of fees paid by the debtor to Hamburg. Hamburg claims that it was unnecessary for it even to file a supplemental disclosure statement because no “application for compensation needed to be filed after the original disclosure and application for compensation since, in a Chapter 7 case, post-petition payments to debtors’ counsel from debtors’ post-petition earnings are not part of the bankruptcy estate.” Appellee’s Brief at p. 10. Second, Hamburg contends that the bankruptcy court did not abuse its discretion by failing to order a full and complete accounting of the fees paid to Hamburg because Hamburg had already filed an application for compensation.

It is necessary as a threshold issue to resolve Hamburg’s contention that it did not have a duty to file a supplemental disclosure statement. If that is the case, then no sanctions should have been issued against Hamburg. If Hamburg is incorrect, however, then the next issue is whether the sanction imposed by the bankruptcy court for failure to disclose was within the court’s discretion. If so, then I must affirm the bankruptcy court’s decision on this issue. Finally, I must determine whether the bankruptcy court properly decided that the Bank abandoned its motion for disgorgement of fees paid or owed to Siman. I will address each of these issues in turn.

A. Did Hamburg Have a Duty to File a Supplemental Disclosure Statement?

In the proceedings before the bankruptcy court, Hamburg took the position that “no disclosure or application for compensation needed to be filed after the original disclosure and application for compensation since, in a Chapter 7 case, post-petition payments to debtors’ counsel from debtor’s post-petition earnings are not part of the bankruptcy estate.” Appellee’s Brief at 10. The bankruptcy court disagreed with Hamburg and ordered Hamburg to file a disclosure statement and fee application by April 27, 1999. See April 13, 1999, Hearing before J. Sigmund, April 13, 1999, at 11-14, 16; see also Order of Bankr. Ct., June 17, 1999, at 2 (explaining that the court ordered Hamburg to file a fee application by April 27, 1999, because it disagreed with Hamburg’s position that “it had disclosed all its prepetition fees and expenses and did not have to disclose its post-petition fees nor file an application for their approvals since they would be paid out of not-estate property, i.e., the postpetition earnings of the Chapter 7 debtors”).

I agree with the bankruptcy court’s conclusion that the plain language of the statute and the rule of bankruptcy procedure governing the disclosure of fee agreements in bankruptcy proceedings required Hamburg to disclose all pre-petition and post-petition fees. Section 329 of the United States Code, which governs debtor’s transactions with attorneys in bankruptcy proceedings, provides:

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

11 U.S.C. § 329(a). In addition, Rule 2016(b) of Bankruptcy Procedure provides:

(b) Disclosure of compensation paid or promised to attorney for debtor

Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statements shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

Fed. R. Bankr. P. 2016(b). Thus, according to the plain language of the statute and rule governing the disclosure of fee agreements in bankruptcy proceedings, Hamburg had an obligation to disclose the payment of fees from the debtors to it. This is true even if Hamburg never applied for compensation from the debtors. Accordingly, the bankruptcy court did not err in concluding that Hamburg had a duty to disclose the receipt of all fees paid or promised to it by the debtors, both pre-petition and post-petition, and in finding that Hamburg breached its duty to disclose by failure to divulge the receipt of post-petition fees.

B. Did the Bankruptcy Court Abuse its Discretion in Ordering Only a Partial Disgorgement of Fees?

The next issue, therefore, is whether the bankruptcy court abused its discretion in determining the proper sanction for the failure to disclose the receipt of fees by Hamburg. In imposing a sanction against Hamburg, the bankruptcy court issued the following order:

1. Hamburg's fees of \$64,051.50 are reasonable[] for services rendered for the applicable period and may be paid subject to paragraph 2 herein.
2. Hamburg shall be required to disgorge all prepetition fees (i.e. [,] \$1,675) which had not been disclosed by crediting debtors with such amount against the award made in paragraph 1. Moreover, the award shall be further reduced by \$10,000 to account for the failure to disclose the postpetition payments.[]
3. Hamburg is allowed \$5,471.30[] as reimbursement of expenses.

Order of Bankr. Ct., June 17, 1999, at 4. Therefore, in essence, the bankruptcy court permitted

Hamburg to collect all of the fees owed to it by the debtors with the exception of \$1,675 in prepetition fees and \$10,000 in postpetition fees.

The Bank now appeals the sanction imposed by the bankruptcy court. See Appellant's Brief at 19-22. In describing the sanction as "meaningless", the Bank asks the court to reverse the bankruptcy court's decision and deny all compensation to counsel. See id. As support for its proposition, the Bank cites cases in which courts have denied all compensation to counsel because of the counsel's failure to comply with the disclosure requirements of bankruptcy law. See id. at 20-22 (citing In re Downs, 103 F.3d 472 (6th Cir. 1996), and In re Quality Respiratory Care, Inc., 157 Bankr. 180 (Bankr. D. Me. 1993), for the proposition that a bankruptcy court has the inherent authority to order complete disgorgement of fees where counsel failed to comply with disclosure requirements).

I agree with the Bank to the extent that it argues that the bankruptcy court had the authority, if it so chose, to deny all compensation to Hamburg. I disagree, however, with the Bank's contention that this sanction was the only sanction available. The decision as to how severely to sanction Hamburg was left to the sound discretion of the bankruptcy court. See In re Prudhomme, 43 F.3d 1000, 1003 (5th Cir. 1995) (observing that the bankruptcy court has "broad discretion in awarding and denying fees paid in connection with bankruptcy proceedings [which] empower the bankruptcy court to order disgorgement as a sanction to debtors' counsel for nondisclosure"); In re Solfanelli, 230 B.R. 54, 71 (M.D. Pa. 1999) (explaining that there is "no automatic forfeiture rule for an attorney's violation of a bankruptcy law disclosure requirement" and "[i]nstead, the bankruptcy court is vested with wide discretion to determine the appropriate sanction"); In re Levin, No. 97-15574 DWS, 1998 WL 732878, at *3 (Bankr. E.D. Pa. Oct. 15,

1998)(explainingthat“[c]ompensationmaybelimitedorcompletelydenied”whenacounsel failstodisclosethepaymentoffees). Butsee InreFuturonicsCorp., 655F.2d463,471(2dCir. 1981)(affirmingthedistrictcourt’sdecisionthatitwasanabuseofdiscretionforthebankruptcy courttopermitcounseltoretainanyfeesbecausethecaseinvolved“atotalpatternofconduct whichbetraysacallousdisregardoftheprofessionalobligationsundertakeninthesebankruptcy proceedings”), cert.deniedsubnom., Israel&Raleyv.FuturonicsCorp., 455U.S.941(1982). Thus,Icannotnowreversethebankruptcycourt’sdecisionunlessethebankruptcycourt abused itsdiscretioninissuingthepartialdisgorgementoffees.

Iconcludethatthebankruptcycourt’sdecisiontodisgorgesomebutnotallofthefees owedbythedebtortoHamburgwasnotanabuseofdiscretion.Thiswasnotacasewherethe bankruptcycourtfoundthatHamburg’sfailuretodisclosewastheresultofanegregious disregardofthebankruptcyrules.Infact,thebankruptcycourtpresslystatedthat,throughits impositionofsanctions,itdidnotintendto“inferthatHamburgintentionallysoughttoconceal thefeesitreceived.”OrderofBankr.Ct.,June17,1999,at4n.9. ³Thus,thebankruptcycourt’s decisiontopartiallydisgorgethefeeswaswellwithinthecourt’sdiscretion.Accordingly,Iwill affirmthatdecision.

C.DidtheBankruptcyCourtAbuseitsDiscretionbyTreatingas“Abandoned”the

³Thebankruptcycourtwascorrectinnotingthatthereisnoexcusefornoncompliance withbankruptcydisclosurerules. SeeOrderofBankr.Ct.,June17,1999,at4n.9(explaining thatevenifthedisclosure“errorswerebornofignorance,indifferenceorcarelessness,their cumulativenaturemustbeaddressed”); seealso InreFricker, 131B.R.932,939(Bankr.E.D. Pa.1991).

Bank's Motion for a Full Accounting for and Disgorgement of Fees Paid to Terry Siman, Esquire?

The motion pending before the bankruptcy court was a motion for disclosure and disgorgement of unauthorized payments of professional fees and expenses made to Hamburg, and to Terry J. Siman. Siman was an attorney hired by the debtor to provide debt counseling services. Siman provided those services both before and after the filing of the petition. The bank sought to compel the disclosure of any payments made by the debtor to Siman, as well as the disgorgement of any payments not properly disclosed by Siman in accordance with the applicable bankruptcy rules.

Although Siman filed a written response to the Bank's motion with the bankruptcy court, he did not appear at either of the hearings held by the bankruptcy court on the issue. At those hearings, neither the court nor the Bank addressed the motion against Siman. As a result, the bankruptcy court concluded that the Bank had "abandoned" its motion against Siman. See Order of Bankr. Ct., June 17, 1999, at 2n.2 ("Movant did not address Siman's conduct at the two hearings, and I therefore conclude that a aspect of the Motion has been abandoned.").

The Bank now appeals the bankruptcy court's conclusion that the Bank had "abandoned" the motion as to Siman. The Bank requests that the court order the bankruptcy court to conduct its own independent review of Siman's compensation. See Appellant's Brief at p. 22. I agree that by simply not raising the motion against Siman at the hearings, the Bank did not expressly waive or abandon its motion against him. Therefore, I will vacate that portion of the bankruptcy court's decision that concluded that the Bank had abandoned its motion as to Siman, and will remand the matter to the bankruptcy court for an independent review of the disclosures made by,

and the compensation owed to, Siman.

CONCLUSION

The bankruptcy court was correct in its conclusion that Hamburg had a duty to disclose any fees received from or promised by the debtors, either pre-petition or post-petition.

Furthermore, the bankruptcy court's decision to disgorge part but not all of the fees owed to Hamburg was not an abuse of the bankruptcy court's discretion. Accordingly, I will affirm the bankruptcy court's decision as to Hamburg.

Because I do not agree that the Bank abandoned its motion against Siman, I will vacate that portion of the bankruptcy court's decision and remand this matter to the bankruptcy court for an independent review of the disclosures made by and fees paid to Siman.

An appropriate order follows.

**INTHEUNITEDSTATESDISTRICTCOURT
FORTHEEASTERNDISTRICTOFPENNSYLVANIA**

INREALBERTOJ.LARRIEU,	:	
DIANEE.LARRIEU,	:	
Debtors.	:	
	:	CIVILACTION
BANKPHILADELPHIA,	:	
Appellant,	:	
v.	:	
	:	
HAMBURG,RUBIN,MULLIN,	:	NO.99-3875
MAXWELL&LUPIN,	:	
Appellee.	:	

ORDER

ANDNOW,this____dayofJanuary,2000,afterconsiderationoftheAppellant's
Brief,theAppellee'sopposition,andtheAppellant'sreplythereto,ITISHEREBYORDERED
thatthebankruptcycourt'sdecisionofJune17,1999,relatingtoHamburg,Rubin,Mullin,
Maxwell&Lupin,P.C.,isAFFIRMED.

Thebankruptcycourt'sdecisionofJune17,1999,relatingtoTerryJ.Siman,Esq.,is
VACATED,andthematterisREMANDEDtothebankruptcycourtforfindingsnotinconsistent
withthecourt'smemorandum.

WilliamH.Yohn,Jr.,J.